

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSE GONZALEZ,

Plaintiff,

V.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 1:15-CV-03106-JTR

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF 5, 21. Attorney D. James Tree represents Jose Gonzalez (Plaintiff); Special Assistant United States Attorney Daniel P. Talbert represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the motions filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **HANDS** the matter to the Commissioner for additional proceedings pursuant to S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for Disability Insurance Benefits (DIB) on December 27, 2010, alleging disability since March 15, 2002, due to three broken vertebra in his neck, arthritis, displaced discs in his back, damaged tendons on the right arm, depression, anxiety, and panic disorder. Tr. 196-197, 231, 269. The applications were denied initially and upon reconsideration. Tr. 115-117, 124-125.

1 Administrative Law Judge (ALJ) Virginia M. Robinson held a hearing on January
 2 14, 2013, at which Plaintiff appeared with a non-attorney representative and
 3 testified. Tr. 49-88. In addition to Plaintiff, witness, Ana Julieta Gonzalez
 4 Lozano, and vocational expert, Trevor Duncan, also testified, and John Hayner was
 5 Plaintiff's interpreter. *Id.* The ALJ issued an unfavorable decision on March 29,
 6 2013. Tr. 32-44. The Appeals Council denied review on April 24, 2015. Tr. 1-6.
 7 The ALJ's March 29, 2013, decision became the final decision of the
 8 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
 9 405(g). Plaintiff filed this action for judicial review on June 26, 2015. ECF No. 1,
 10 4.

STATEMENT OF FACTS

12 The facts of the case are set forth in the administrative hearing transcript, the
 13 ALJ's decision, and the briefs of the parties. They are only briefly summarized
 14 here.

15 Plaintiff was 37 years old at the alleged date of onset. Tr. 196. Plaintiff's
 16 last grade completed with the sixth, and it was completed in Mexico. Tr. 232.
 17 Plaintiff's work history included agricultural labor. Tr. 232. Plaintiff reported he
 18 stopped working on March 15, 2002, because of his condition. Tr. 231.

STANDARD OF REVIEW

20 The ALJ is responsible for determining credibility, resolving conflicts in
 21 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
 22 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
 23 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
 24 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
 25 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
 26 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
 27 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
 28 another way, substantial evidence is such relevant evidence as a reasonable mind

1 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
 2 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
 3 interpretation, the court may not substitute its judgment for that of the ALJ.
 4 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
 5 evidence will be set aside if the proper legal standards were not applied in
 6 weighing the evidence and making the decision. *Brawner v. Secretary of Health*
 7 and Human Services, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
 8 supports the administrative findings, or if conflicting evidence supports a finding
 9 of either disability or non-disability, the ALJ's determination is conclusive.
 10 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

11 **SEQUENTIAL EVALUATION PROCESS**

12 The Commissioner has established a five-step sequential evaluation process
 13 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *see Bowen*
 14 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
 15 proof rests upon the claimant to establish a *prima facie* case of entitlement to
 16 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a
 17 claimant establishes that physical or mental impairments prevent him from
 18 engaging in his previous occupations. 20 C.F.R. § 404.1520(a)(4). If a claimant
 19 cannot do his past relevant work, the ALJ proceeds to step five, and the burden
 20 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
 21 other work, and (2) specific jobs exist in the national economy which the claimant
 22 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194
 23 (2004). If the claimant cannot make an adjustment to other work in the national
 24 economy, a finding of "disabled" is made. 20 C.F.R. § 404.1520(a)(4)(v).

25 **ADMINISTRATIVE DECISION**

26 On March 29, 2013, the ALJ issued a decision finding Plaintiff was not
 27 disabled as defined in the Social Security Act.

28 At step one, the ALJ found Plaintiff had not engaged in substantial gainful

1 activity from March 15, 2002, the alleged date of onset, through September 30,
 2 2007, the last date Plaintiff had insured status for DIB. Tr. 34.

3 At step two, the ALJ determined Plaintiff had the following severe
 4 impairments: lumbar, left shoulder, and cervical sprains in 1999; degenerative disc
 5 disease; and various mental disorders. Tr. 34.

6 At step three, the ALJ found Plaintiff did not have an impairment or
 7 combination of impairments that met or medically equaled the severity of one of
 8 the listed impairments. Tr. 34-36.

9 At step four, the ALJ assessed Plaintiff's residual function capacity and
 10 determined he could perform a range of light work with the following limitations:

11 He can occasionally climb ramps and stairs. He can never climb
 12 ladders, ropes or scaffolds. His reaching is unlimited with the right
 13 upper extremity but limited to frequent reaching with the left upper
 14 extremity. He can frequently stoop, kneel, crouch, and crawl. He must
 15 avoid working at unprotected heights. He can perform work that is
 16 limited to simple tasks with simple work related decisions and only
 occasional and superficial interaction with the public.

17 Tr. 36. The ALJ identified Plaintiff's past relevant work as "farmworker, fruit"
 18 and found that Plaintiff was not able to perform this past relevant work. Tr. 42-43.

19 At step five, the ALJ determined that, considering Plaintiff's age, education,
 20 work experience and residual functional capacity, and based on the testimony of
 21 the vocational expert, there were other jobs that exist in significant numbers in the
 22 national economy Plaintiff could perform, including the jobs of production
 23 assembler, hand packager, and mail clerk. Tr. 43. The ALJ concluded Plaintiff
 24 was not under a disability within the meaning of the Social Security Act at any
 25 time from March 15, 2002, the alleged date of onset, through September 30, 2007,
 26 the date Plaintiff was last insured. Tr. 44.

27 ISSUES

28 The question presented is whether substantial evidence supports the ALJ's

1 decision denying benefits and, if so, whether that decision is based on proper legal
2 standards. Plaintiff contends the ALJ erred by (1) failing to accord proper weight
3 to the medical source opinions in the record; (2) failing to consider the
4 determination of another government agency, (3) failing to consider the testimony
5 of a lay witness; and (4) failing to properly credit Plaintiff's testimony about the
6 severity of his symptoms.

7 DISCUSSION

8 A. Medical Source Opinions

9 Plaintiff challenges the weight the ALJ provided to the opinions of Andrew
10 D. Whitmont, Ph.D., Ronald G. Early, Ph.D., M.D., Flint Orr, M.D., David
11 Whitney, M.D., Leslie Postovoit, Ph.D., and CeCilia Cooper, Ph.D. ECF No. 15 at
12 17-22.

13 In weighing medical source opinions, the ALJ should distinguish between
14 three different types of physicians: (1) treating physicians, who actually treat the
15 claimant; (2) examining physicians, who examine but do not treat the claimant;
16 and, (3) nonexamining physicians who neither treat nor examine the claimant.

17 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
18 weight to the opinion of a treating physician than to the opinion of an examining
19 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). The ALJ should give
20 more weight to the opinion of an examining physician than to the opinion of a
21 nonexamining physician. *Id.*

22 When a treating physician's opinion is not contradicted by another
23 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.

24 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
25 physician's opinion is contradicted by another physician, the ALJ is only required
26 to provide "specific and legitimate reasons" for rejecting the opinion of the first
27 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when
28 an examining physician's opinion is not contradicted by another physician, the

1 ALJ may reject the opinion only for “clear and convincing” reasons. *Lester*, 81
 2 F.2d at 830. When an examining physician’s opinion is contradicted by another
 3 physician, the ALJ is only required to provide “specific and legitimate reasons” for
 4 rejecting the opinion of the examining physician. *Id.* at 830-831.

5 The specific and legitimate standard can be met by the ALJ setting out a
 6 detailed and thorough summary of the facts and conflicting clinical evidence,
 7 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
 8 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer her
 9 conclusions, she “must set forth [her] interpretations and explain why they, rather
 10 than the doctors’, are correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.
 11 1988).

12 **1. Andrew D. Whitmont, Ph.D.**

13 Dr. Whitmont completed a report on February 2, 2004, in which he
 14 diagnosed Plaintiff with a pain disorder associated with psychological factors and a
 15 general medical condition, major depression, and panic disorder with agoraphobia
 16 resolved. Tr. 278. Dr. Whitmont stated that Plaintiff’s depression and anxiety
 17 were resolved and that no further treatment was planned. *Id.* “He should be sent
 18 to a closing IME or pensioned because his Category III pain disorder is permanent
 19 and prevents him from being able to [return to work].” *Id.*

20 The ALJ gave Dr. Whitmont’s opinion “very little, if any, weight,” because
 21 the opinion was based heavily on Plaintiff’s self-reports, it was inconsistent with
 22 subsequent objective medical evidence, and it was inconsistent with Plaintiff’s
 23 broad range of activities. Tr. 41.

24 The ALJ’s first reason for rejecting Dr. Whitmont’s opinion, that it was
 25 based on Plaintiff’s self-reports, does not meet the specific and legitimate standard.
 26 A doctor’s opinion may be discounted if it relies on a claimant’s unreliable self-
 27 report. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005); *Tommasetti v.*
 28 *Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). But the ALJ must provide the basis

1 for her conclusion that the opinion was based on a claimant's self-reports. *Ghanim*
 2 *v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014). Here, the ALJ simply concluded
 3 that Dr. Whitmont's opinion was based on Plaintiff's self-reports without
 4 providing any basis for the determination. Tr. 41. Therefore, this reason is not
 5 legally sufficient to support the ALJ's rejection of Dr. Whitmont's opinion.

6 The ALJ's second and third reasons for rejecting Dr. Whitmont's opinion,
 7 that it was inconsistent with the subsequent objective medical evidence and the
 8 claimant's broad range of activities, is not a legally sufficient reason.

9 Inconsistency with the majority of objective evidence is a specific and legitimate
 10 reason for rejecting physician's opinions. *Batson*, 359 F.3d at 1196; *see also*
 11 *Lester*, 81 F.3d at 831 (The ALJ may give weight to consulting opinions "only
 12 insofar as they are supported by evidence in the case record."). In his decision, the
 13 ALJ summarized the medical evidence and Dr. Whitmont's opinion, but failed to
 14 state how Dr. Whitmont's opinion was inconsistent with the medical evidence or
 15 his reported activities. *See Embrey*, 849 F.2d at 421-422 (the ALJ is required to do
 16 more than offer her conclusions, she "must set forth [her] interpretations and
 17 explain why they, rather than the doctors', are correct"). Therefore, the ALJ failed
 18 to meet the specific and legitimate standard in her rejection of Dr. Whitmont's
 19 opinion.

20 **2. Ronald G. Early, Ph.D., M.D.**

21 On April 3, 2006, Dr. Early evaluated Plaintiff and reviewed 750 pages of
 22 medical evidence. Tr. 317-324. Dr. Early diagnosed Plaintiff with major
 23 depressive disorder, pain disorder associated with psychological factors and
 24 general medical condition, and anxiety disorder. Tr. 323. Dr. Early gave the
 25 following opinion:

26 [V]ocational services are not indicated for this gentleman. He has
 27 essentially been unable to work on a consistent meaningful basis since
 28 the industrial injury of August 23, 1999. He has a sixth grade education

1 in Mexico which is not the equivalent of a sixth grade education in the
2 United States. He is functionally illiterate in the English language. He
3 has no transferable job skills other than for physical labor which he
4 cannot do. Additional efforts to return this gentleman to full time
5 meaningful and gainful employment on a sustained basis will fail and
6 will simply be more frustrating for individuals attempting to assist Mr.
7 Gonzalez in doing so. It would also add additional stress for Mr.
8 Gonzalez and will likely result in a worsening of his mental health
9 conditions.

10 Tr. 324. Dr. Early continued, “Mr. Gonzalez is totally and permanently disabled as
11 a result of combined physical injury, mental health diagnoses and psychosocial
12 factors.” *Id.*

13 The ALJ gave Dr. Early’s opinion “very little, if any, weight” because it was
14 based heavily on Plaintiff’s self-reports, it was inconsistent with the subsequent
15 objective medical evidence, and it was inconsistent with Plaintiff’s broad range of
16 activities. Tr. 41-42. These are the same reasons the ALJ rejected Dr. Whitmont’s
17 opinions. Again the ALJ failed to provide a basis for why he found Dr. Early’s
18 opinion to be based on Plaintiff’s self-reports and he failed to address how Dr.
19 Early’s opinion was inconsistent with Plaintiff’s medical records and reported
20 activities. As discussed above, these reasons fail to meet the specific and
 legitimate standard. Therefore, the ALJ’s treatment of Dr. Early’s opinion was in
 error.

21 **3. Flint Orr, M.D.**

22 On May 24, 2011, Dr. Orr wrote a letter stating that he had been Plaintiff’s
23 primary care physician since 2006 and Plaintiff “continued to need medications for
24 the chronic symptoms from the injury and has not been able to return to work.
25 Therefore, I consider him chronically disabled.” Tr. 411. On August 15, 2012, Dr.
26 Orr wrote a letter stating the same. Tr. 410.

27 The ALJ did not discuss Dr. Orr’s letters in her decision. Tr. 32-44. The
28 ALJ is to consider all medical source opinions in the record, and if the residual

1 functional capacity assessment differs from a medical source opinion, the ALJ
 2 must explain why the opinion was not adopted. S.S.R. 96-8p.¹ Defendant asserts
 3 that because Dr. Postovoit wrote that Dr. Orr admitted he did not know much about
 4 Plaintiff's ability to work, Dr. Orr's letters were not probative evidence and did not
 5 need to be discussed. ECF No. 21 at 12. The record contains Dr. Postovoit's
 6 summary of her conversation with Dr. Orr on October 1, 2011. Tr. 388. Dr.
 7 Postovoit stated Dr. Orr was less familiar with Plaintiff's medical history overall,
 8 he only saw Plaintiff for brief medical renewal appointments about twice a year, he
 9 did not recall that Plaintiff appeared somatically preoccupied or in significant pain,
 10 and he had not asked Plaintiff if he any possible conversion disorder symptoms.
 11 *Id.* Dr. Postovoit wrote that Dr. Orr could offer nothing regarding how Plaintiff's
 12 shoulder and neck pain adversely affect his daily functioning. *Id.*

13 While Dr. Postovoit's memorialization of her phone call to Dr. Orr may
 14 support a determination that Dr. Orr's letters are entitled to limited weight, the ALJ
 15 failed to weigh Dr. Orr's letters at all. The ALJ should have discussed the treating
 16 physician's letters in his determination. The failure to do so was in error.

17 **4. David Whitney, M.D.**

18 Dr. Whitney examined Plaintiff on June 16, 2004, at the request for the
 19 Department of Labor and Industries. Tr. 280-291. Dr. Whitney reviewed
 20 Plaintiff's records from September 1999 to the date of the evaluation. Tr. 281-283.

22 ¹Although they do not carry the force of law, Social Security Rulings are
 23 "binding on all components of the Social Security Administration." 20 C.F.R. §
 24 402.35(b)(1) and (2). Such rulings "reflect the official interpretation of the [Social
 25 Security Administration] and are entitled to some deference as long as they are
 26 consistent with the Social Security Act and regulations." *Molina v. Astrue*, 674
 27 F.3d 1104, 1113 n.5 (9th Cir. 2012) (citations and internal quotation marks
 28 omitted).

1 He diagnosed Plaintiff with a cervical sprain, lumbosacral sprain, and a left
2 shoulder sprain. Tr. 287. Dr. Whitney opined that Plaintiff could seldom lift and
3 carry 21-25 pounds, occasionally lift and carry 11-20 pounds, frequently lift and
4 carry 6-10 pounds, and continuously lift and carry up to 5 pounds. Tr. 291. He
5 further opined that Plaintiff was limited to seldom kneeling crawling, climbing,
6 and reaching above the shoulder and occasionally bending and squatting. *Id.*

7 The ALJ gave Dr. Whitney's opinion "some weight, however, I considered
8 and gave weight to additional medical evidence after 2004 in formulating the
9 residual functional capacity." Tr. 41. Here, the ALJ failed to give any specific
10 reason as to why she limited to the weight given to Dr. Whitney's opinion. At a
11 minimum, the ALJ must provide specific and legitimate reasons for rejecting an
12 examining physician's opinion. *Lester*, 81 F.2d at 830-831. Therefore, the ALJ's
13 failure to provide a single reason why he gave limited weight to Dr. Whitney's
14 opinion is in error.

15 **5. Leslie Postovit, Ph.D.**

16 On November 21, 2011, Dr. Postovit reviewed the records available in
17 Plaintiff's file and opined that for the time period of March 15, 2002, to March 31,
18 Plaintiff's work history had always been with simple labor, he had a sixth
19 grade education with very limited English, Plaintiff's somatic concerns would
20 preclude the ability to focus on work-related tasks reliably, Plaintiff would not
21 manage a job with much need for public interaction, and Plaintiff would require
22 work that would be very predictable and with very steady production demands,
23 which would not require much independent decision making on his part. Tr. 107-
24 109. Finally, Dr. Postovit stated that Plaintiff was diagnosed with major
25 depressive disorder, conversion disorder, and pain disorder with "somatic
26 preoccupation being too severe for [Plaintiff] to return to work activities." Tr. 109.

27 Then, Dr. Postovit opined that from April 1, 2006, to the date of her opinion,
28 November 21, 2011, Plaintiff's limited education and English abilities precluded

1 him from working beyond simple routine tasks; he would be too slow to tackle
2 new complex tasks, but could manage simple routine tasks and some hands-on
3 complex tasks that he had been able to learn slowly at his pace (such as reading
4 well enough to pass driving test and reading information regarding store sales); he
5 would be poorly suited for work beyond intermittent and casual contact with the
6 public due to his concrete thinking and limited English skills; and he would need
7 work that was predictable in task expectation and work flow, and did not require
8 him to make many independent decisions. Tr. 110-111.

9 The ALJ gave Dr. Postovoit's opinion "some weight." Tr. 41. While Dr.
10 Postovit was only a non-examining psychologist, the ALJ failed to discuss why the
11 he did not adopt Dr. Postovoit's opinion that Plaintiff was unable to work from his
12 alleged date of onset through March 31, 2006. Therefore, the ALJ erred in her
13 treatment of Dr. Postovoit's opinion. *See S.S.R. 96-8p.*

14 **6. CeCilia Cooper, Ph.D.**

15 On November 10, 2011, Dr. Cooper reviewed Plaintiff's medical records
16 and conducted an evaluation. Tr. 380-387. Dr. Cooper diagnosed Plaintiff with
17 pain disorder with both psychological factors and a general medical condition,
18 adjustment disorder with depressed mood, and some passive aggressive traits. Tr.
19 385. Dr. Cooper provided the following opinion:

20 Based on the results of this evaluation it is felt that Mr. [Gonzalez] is
21 able to understand, remember and carry out instructions for tasks
22 involving two or three closely related steps. He would have difficulty
23 with more complex instructions. He would do tasks requiring much
24 physical labor, slowly. He would have problems maintaining attention
25 and concentration for extended periods of time because of subjective
26 feelings of pain and because of depression. He would have problems
27 with change because his thinking is concrete. He would do best in
28 situations in which he could practice new behaviors related to changes
several times before the changes are implemented. Visual aids and
demonstrations would be helpful. Supervisors would do well to not
give him a new task to do until he has completed the one he has. Having

1 him repeat instructions in his own words would also be of benefit. Mr.
 2 [Gonzalez] would usually respond appropriately to normal hazards. He
 3 would not require close supervision once he has a comfortable routine
 4 to follow. He would respond well to having his efforts to succeed
 noted.

5 Tr. 386.

6 Additionally, Dr. Cooper noted that Plaintiff “might require help keeping
 7 his surroundings in good order.” *Id.* The ALJ did not discuss Dr. Cooper’s
 8 opinion in her decision. Tr. 32-44.

9 Defendant asserts that since the opinion was after Plaintiff’s date last
 10 insured, it was not probative evidence and did not need to be discussed. ECF No.
 11 22 at 12-13. Medical evidence generated after the expiration of a claimant’s
 12 insured status may be relevant in determining a claimant’s pre-expiration
 13 condition; such evidence may not be disregarded solely because it was generated
 14 retrospectively. *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir.1988). Dr. Cooper
 15 reviewed records from prior to Plaintiff’s date last insured as part of forming her
 16 opinion. Tr. 380. The ALJ is to consider all medical source opinions in the record,
 17 and if the residual functional capacity assessment differs from a medical source
 18 opinion, the ALJ must explain why the opinion was not adopted. S.S.R. 96-8p.
 19 Therefore, the ALJ’s failure to address Dr. Cooper’s opinion is in error.

20 Considering the numerous errors the ALJ committed in his treatment of
 21 medical source opinions throughout the record, the case is remanded for additional
 22 proceedings and the ALJ is instructed to readdress all medical source opinions in
 23 the file, weighing and discussing each one.

24 **B. Determination of Another Government Agency**

25 The record shows that Plaintiff was injured on the job in 1999 and contains a
 26 Proposed Decision and Order signed by Daniel W. Johnson, Industrial Appeals
 27 Judge for the Board of Industrial Insurance Appeals for the State of Washington
 28 finding Plaintiff totally and permanently disabled as of March 7, 2006. Tr. 211-

1 223.

2 Plaintiff challenges the ALJ's failure to discuss this decision, which found
3 that Plaintiff was permanently and totally disabled as of March 7, 2006. ECF NO.
4 15 at 22.

5 A determination of disability by another government agency is not binding
6 on the Social Security Administration, but it is evidence under agency regulations.
7 20 C.F.R. §§ 404.1504, 404.1512(b)(v); *See Wilson v. Heckler*, 761 F.2d 1383,
8 1385 (9th Cir. 1985) ("The state finding may be introduced into evidence before
9 the Secretary, but she may attribute as much or as little weight to it as she deems
10 appropriate.").

11 Considering the case is being remanded and the ALJ has been instructed to
12 readdress the opinions of Dr. Early and Dr. Whitney, who performed evaluations
13 for the Department of Labor and Industries, the ALJ is also instructed to address
14 the Department of Labor and Industries' decision upon remand.

15 **C. Lay Witness Testimony**

16 Plaintiff challenges the ALJ's failure to discuss his wife's testimony. ECF
17 No. 15 at 22-23.

18 Lay witness testimony cannot establish the existence of medically
19 determinable impairments. *See* 20 C.F.R. § 404.1513. However, it is competent
20 evidence as to a claimant's symptoms or how an impairment affects the claimant's
21 ability to work, and the ALJ must take it into account. *Nguyen v. Chater*, 100 F.3d
22 1462, 1467 (9th Cir. 1996); *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).
23 The Ninth Circuit has held that competent lay witness testimony "cannot be
24 disregarded without comment," *Nguyen*, 100 F.3d at 1467, and that in order to
25 discount competent lay witness testimony, the ALJ "must give reasons that are
26 germane to each witness," *Dodrill*, 12 F.3d at 919.

27 Considering this case is already being remanded for the ALJ to readdress the
28 medical source opinions in the record, the ALJ is further instructed to consider and

1 discuss Plaintiff's wife's testimony upon remand.

2 **D. Credibility**

3 Plaintiff contests the ALJ's adverse credibility determination in this case.
 4 ECF No. 15 at 24-25.

5 It is generally the province of the ALJ to make credibility determinations,
 6 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
 7 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
 8 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
 9 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d
 10 1273, 1281 (9th Cir. 1996); *Lester*, 81 F.3d at 834.

11 Considering the case is being remanded, the ALJ is further instructed to
 12 readdress Plaintiff's credibility on remand.

13 **REMEDY**

14 The decision whether to remand for further proceedings or reverse and
 15 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
 16 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
 17 where "no useful purpose would be served by further administrative proceedings,
 18 or where the record has been thoroughly developed," *Varney v. Secretary of Health
 & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
 20 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
 21 (9th Cir. 1990); *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
 22 (noting that a district court may abuse its discretion not to remand for benefits
 23 when all of these conditions are met). This policy is based on the "need to
 24 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are
 25 outstanding issues that must be resolved before a determination can be made, and it
 26 is not clear from the record that the ALJ would be required to find a claimant
 27 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
 28 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211

1 F.3d 1172, 1179-80 (9th Cir. 2000).

2 In this case, it is not clear from the record that the ALJ would be required to
3 find Plaintiff disabled if all the evidence were properly evaluated. Further
4 proceedings are necessary for the ALJ to consider and weigh the medical source
5 statements in the record, the disability determination made by the Department of
6 Labor and Industry, and Plaintiff's wife's testimony. Additionally, the ALJ is
7 instructed to readdress Plaintiff's credibility finding. The ALJ will also need to
8 supplement the record of any outstanding medical evidence, and elicit testimony at
9 the hearing from both a medical expert and a psychological expert.

10 **CONCLUSION**

11 Accordingly, **IT IS ORDERED:**

12 1. Defendant's Motion for Summary Judgment, **ECF No. 21**, is

13 **DENIED.**

14 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is

15 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
16 additional proceedings consistent with this Order.

17 3. Application for attorney fees may be filed by separate motion.

18 The District Court Executive is directed to file this Order and provide a copy
19 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
20 and the file shall be **CLOSED**.

21 DATED May 18, 2016.



A handwritten signature in black ink, appearing to read "M".

22
23 JOHN T. RODGERS
24 UNITED STATES MAGISTRATE JUDGE
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